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GENERAL COUNSEL'S OPINION NUMBER 59-3, DATED 3 APRIL 1959

Regulatory requirements with respect to the payment for or crediting of unused compensatory time earned must be strictly complied with.

TO THE ACTING CHIEF, FINANCE DIVISION

1. This is in reply to your request for an opinion from the Office of General Counsel as to whether or not, according to regulations, the sums paid to two employees are overpayments. The cases are discussed below.

2. By statute (5 USC 911) "all hours of work officially ordered or approved in excess of 40 hours in any administrative week performed by officers and employees . . . shall be considered overtime work and compensation for such overtime work, except as otherwise provided for in this chapter shall be at [specified] rates." Section 912 of Title 5, United States Code provides that the head of an agency may, at the request of an employee, grant "compensatory time off from his scheduled tour of duty in lieu of payment for an equal amount of time spent in irregular or occasional overtime work," and the head of an agency may, at his own discretion, "provide that an employee whose pay is above that of a GS-9 at the top of his grade shall be compensated for irregular or occasional overtime work for which compensation would be due . . . with an equal amount of compensatory time off from his scheduled tour of duty in lieu of such compensation." The Comptroller General has ruled that ". . . the head of an agency may by regulation fix a limit of time within which such compensatory time off from duty may be requested or taken. Also, it would not be improper to provide by administrative regulation that upon failure of an employee to take the compensatory time off from duty which he had requested within the time prescribed he would lose his right to overtime compensation. However, there would be no authority to deny payment of overtime compensation where the failure to take the compensatory time off from duty within the period prescribed by administrative regulation was due to an exigency of the service beyond the control of the employee" (25 Comp. Gen. 62, 64)

3. [] prescribes "overtime and holiday work policy." Paragraph 3g states that "compensatory time off shall be taken as soon as practicable (generally within 90 days) after it has been earned." Paragraph 4a(2), in effect in June 1958, states that: "An employee in grade 11 or above normally will be granted compensatory time off in lieu of overtime pay for overtime work within the amounts permitted by law. However, when the Chief of Station or Base concerned establishes that it is not feasible to grant compensatory time off to an employee in this grade range, he will authorize payment of the appropriate overtime rate."

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4. Here, according to the facts presented, Mr. G. N. had a balance of 202 hours of unused compensatory time. He was at that time, according to our investigation, a grade GS-12. Mr. N. was paid \$832.62 for the 202 hours on the basis of a Dispatch from the Chief of Station, T. who recommended payment consistent with paragraph 3g of [redacted] the Chief of Station must certify that an employee "has been denied or not afforded the opportunity to use compensatory time off at the installation" in order that an employee who is departing on a permanent change of station may be authorized payment for unused compensatory time in excess of 80 hours. By paragraph 3g, a payment at the overtime rate for compensatory time in excess of 80 hours can be paid when properly certified only to an employee who is transferring on a permanent change of station.

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5. In this case (1) Mr. N. did not depart T. Station on permanent change of station, and (2) paragraph [redacted] does not authorize lump-sum payment for the total amount of unused compensatory time under these circumstances. Also, under paragraph 3g, in cases where payment for unused compensatory time off in excess of 80 hours is contemplated to a person departing on permanent change of station, the Chief of Station or Base must certify that an employee has been denied or not afforded the opportunity to use compensatory time off at the installation. This was not done in Mr. N's. case. The Chief of Station merely recommended payment, but he did not certify. The requirement of the [redacted] Notice is specific and should be complied with. Therefore, the lump-sum payment to Mr. N. was not in accordance with [redacted]

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6. The payment of the appropriate overtime rate to Mr. N. could have been accomplished under paragraph [redacted] "When the Chief of Station or Base concerned establishes that it is not feasible to grant compensatory time off in [Grade 11 or above], he will authorize payment at the appropriate overtime rate." This paragraph would seem apropos of Mr. N's. situation, particularly when we found that according to the record of Mr. N's. accrued compensatory time the directive "that compensatory time off shall be taken as soon as practicable (generally within 90 days) after it has been earned" in paragraph [redacted] was disregarded. Accrued compensatory time which was not used went back to August of 1955, nearly three years prior to departure from T.

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7. The second case involves a payment to Mr. E. G. S. It is assumed that Mr. S., who was a GS-12, left S. on a permanent change of station transfer. According to [redacted] when an employee is urgently needed in the next post, an "80 hours' delay may be detrimental to the official activities of the Organization" and the employee "may be paid at the appropriate overtime rate for all compensatory time that he had been denied or not afforded an opportunity to use while at the installation where earned."

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8. In the absence of any showing that the employee was urgently needed at the next post and that 80 hours' delay by Mr. S. may have been detrimental to the official activities of the Organization, this Office agrees that the use of 208 hours of annual leave en route to the United States indicates that there was no urgency about Mr. S's. arrival at his new station. It follows that under paragraph 3g, which states that employees may be authorized up to 80 hours' compensatory time, Mr. S. should have been paid the difference between 271 hours, his total accrued compensatory time, and 80 hours or 191 hours, and in the adjustment of Mr. S's. leave record, 80 hours must be credited to his annual leave account. We must point out that paragraph 3g has fixed a limit of time within which compensatory time off from duty may be taken, but it has not been provided by regulation that upon failure of an employee to take the compensatory time off from duty which he had requested within the time prescribed he would lose his right to overtime compensation (25 Comp. Gen. 62, 64).

LAWRENCE R. HOUSTON
General Counsel

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